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Nos. 75-1393 and 75-1394

In the Supreme Court of the United States

OCTOBER TERM, 1976

RALPH PRINCIPIE, PETITIONER

v.

UNITED STATES OF AMERICA

PAUL LABRIOLA AND DAWN SLOMKA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B 2387-2406)[1] is reported at 531 F. 2d 1132.

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[1]"Pet. App." refers to the appendices in No. 75-1394.

QUESTIONS PRESENTED

1. Whether, once a suspect is identified in the course of an electronic interception, the government must obtain an amended order before continuing to intercept his conversations (Petitioner Labriola).

2. Whether identification of a suspect only by his first name in an application for an intercept order was sufficient under the circumstances of this case (Petitioner Principie).

3. Whether there was probable cause to identify one of the named subjects in an intercept application and order (Petitioner Labriola).

4. Whether the failure to limit monitoring to the hours specified in the order required suppression of all conversations monitored pursuant to that order (Petitioners Labriola and Slomka).

5. Whether any defects in notifying petitioners that their conversations had been overheard warranted suppression under the circumstances of this case (all petitioners).

STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having conspired to forge and utter United States savings bonds stolen from the mails, in violation of 18 U.S.C. 371, 495, and 1708. In addition, petitioner Labriola was convicted of having forged United States savings bonds, in violation of 18 U.S.C. 495. Petitioner Labriola was sentenced to concurrent five-year terms of imprisonment on each count and a $5,000 fine; petitioner Principie was sentenced to four years' imprisonment; petitioner Slomka received a suspended

three-year term of imprisonment and was placed on probation for three years. The court of appeals affirmed (Pet. App. B 2387-2406).

On June 19, 1972, Stanley Reinhardt told Brooklyn Assistant District Attorney Leonard Newman that Joseph Martino had offered to sell Reinhardt certain stolen United States postal bonds at 25 percent of their face value (Tr. 5-6).[2] Martino had informed Reinhardt that he could be contacted at a number listed in the name of the 1234 Club; Martino told him to call that number and ask for "Paul" (Tr. 6).[3] Reinhardt consented to the recording of his conversation when he called Martino at that number the next day (Tr. 7). In the conversation, Martino alluded to the existence of co-conspirators, telling Reinhardt that "everyone's waiting here [at the 1234 Club]" and that he received hourly reports from the people from whom he acquired the bonds (Tr. 26).

Thereafter, Assistant District Attorney Newman prepared an application for electronic surveillance of the 1234 Club. On July 5, 1972, Justice Vetrano of the New York Supreme Court, Kings County, issued an order pursuant to N.Y. Crim. Proc. L. 700.15 *et seq.* (McKinney 1971)

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[2]Investigation disclosed that the bonds were part of a group that were missing from a New York brokerage firm (Tr. 23).

[3]The investigators at first believed that "Paul" was a code name used by the conspirators at the club to identify those involved in the scheme (Tr. 28, 43). Later, the officers learned that "Paul" in fact referred to petitioner Labriola.

[4]The court below concluded that the relevant portions of the New York statute are substantially identical to those of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520). See Pet. App. B 2391 n. 5, 2401 n. 11, 2404 n. 12. Petitioners do not dispute this conclusion. In any event, the court below correctly concluded that this case is controlled by the provisions of the federal statute. See 18 U.S.C. 2516(2).

(Pet. App. D)[4] authorizing the interception of "the telephonic communications of Joe Martino, his co-conspirators, agents, and associates as described and delineated in * * * the herein incorporated affidavit" (Order of July 5, 1972).[5] The affidavit described the conversations to be intercepted as those of "Martino, his co-conspirators, agents, associates and 'Ralph' " (*ibid.*). Because the telephone was out of order, the actual interception of conversations did not commence until July 11. The July 5 order was renewed and amended by succeeding orders issued on July 27, September 11, September 27, and October 28.

The July 27 order authorized a continuation of the wire interceptions of the telephone at the 1234 Club. The order also identified petitioner Paul Labriola as a target of the interception. In addition, the July 27 order authorized the electronic interception of face-to-face conversations at the 1234 Club before 7:30 p.m. daily. Although these orders were again extended on September 11, petitioners moved their base of operations before that time to the Say Hi Club in Brooklyn, following the closing of the 1234 Club. The September 27, 1972, order authorized the interception of pertinent conversations over a telephone line listed in the name of the Say Hi Club. Petitioner Labriola was again named as a target of the interception in this order, and petitioner Principie was identified by his full name for the first time. The order of October 28 extended the September 27 order. The authorization expired on November 26, 1972. The evidence at trial consisted primarily of communications intercepted pursuant to these orders.

[4]We are lodging copies of the five interception orders in this case with the Clerk of this Court.

ARGUMENT

1. Petitioners Labriola and Principie claim that they were not properly identified in the intercept applications and orders and contend that certain conversations in which they participated should accordingly have been suppressed. They rely on the requirement that the application and order must disclose "the identity of the person, if known, committing the offense and whose conversations are to be intercepted." 18 U.S.C. 2518(1)(b)(iv), 2518(4)(a); cf. N.Y. Crim. Proc. L. 700.20(2)(b)(iv), 700.30 (2). For the reasons explained in our brief in *United States* v. *Donovan*, No. 75-212, we believe that this provision requires the disclosure only of the primary target of the investigation.[6] In this case, that target was apparently Joe Martino (Pet. App. B 2389-2390). But even assuming that the statute required the naming of petitioners Labriola and Principie when they were identified, it was not violated here.

a. Petitioner Labriola concedes that the failure to name him in the July 5 order was proper. He contends, however, that once he was identified on the basis of a conversation on July 14, the agents were required to cease interception of his conversations until they obtained an amended order naming him. Petitioner cites no authority in support of this novel proposition, and we know of none. Even courts that have concluded that the government must name all those it has probable cause to believe will be overheard in illicit conversations have imposed that requirement only as of the time when the application for an order is filed. See, *e.g.*, *United States* v. *Donovan*, 513 F. 2d 337 (C.A. 6), certiorari granted February 23, 1976, No. 75-212; *United states* v. *Russo*, 527 F. 2d 1051, 1057

[6]We are serving a copy of our *Donovan* brief on petitioners.

(C.A. 10), certiorari denied June 1, 1976, No. 75-1218. It follows that, at least when all persons identified in the course of an interception are named in the application for an order authorizing the extension of that interception, the statute is satisfied.[7] Since petitioner Labriola was named in the first application for an extension order following his identification, and in all subsequent applications and orders, his claim is without merit.

b. Petitioner Principie contends that he was insufficiently identified. His full name was given in the applications and orders of September 27 and October 28, 1972; he was identified only as "Ralph" in the July 5, July 27, and September 11 orders (Pet. App. B 2396). He contends that his full name was known to the agents "as early as August 17, 1972 and perhaps as early as late July 1972" (Pet. No. 75-1393, pp. 16-17).[8] The court of appeals correctly concluded (Pet. App. B 2396) that, in the absence of any showing of bad faith on the part of the investigating officers, "we fail to see how we can find error in admitting into evidence the fruits of a wiretap conducted under a court order based on a judicial determination that probable

[7]As the court of appeals noted (Pet. App. B 2395, n. 9), the New York statute does require that an amended intercept application be filed "as soon as practicable" after evidence of a new crime is discovered, N.Y. Crim. Proc. L. 700.65(4), but cf. 18 U.S.C. 2517(5). This provision does not require the amendment of an application upon discovery of the participation of previously unidentified persons in the crime under investigation. *People* v. *Gnozzo*, 31 N.Y. 2d 134, 142-145, 335 N.Y.S. 2d 257, certiorari denied *sub nom. Zorn* v. *New York*, 410 U.S. 943; cf. *United States* v. *O'Neill*, 497 F. 2d 1020, 1023 (C.A. 6).

[8]Although petitioner offers no support for this assertion, he relied in the court of appeals on evidence that his house was under surveillance on July 26, 1972 (Tr. 247). The police officer supervising the intercceptions testified that he first became aware of petitioner Principie's full name on August 17, 1972 (Tr. 89, 239).

cause existed to monitor the conversations of this very defendant, merely because his last name was omitted from the order."

But even assuming that petitioner Principie should have been fully identified as soon as practicable, and thus that the omission of his full name from the September 11 application and order was erroneous,[9] petitioner suffered no harm, since no conversations were intercepted pursuant to that order (Tr. 264, 299-300).

2. Petitioner Labriola asserts that there was insufficient probable cause to name him in the July 27 application and order[10] and contends that it was accordingly improper to intercept his conversations pursuant to that order. Neither the premise nor the conclusion is correct.

The facts alleged in the affidavit supporting the July 27 application and order amply support the finding of probable cause. The affidavit referred, *inter alia*, to two conversations overheard on July 21, 1972, from which it could reasonably be inferred that petitioner Labriola was interested in acquiring a stamp which could be used to validate stolen bonds and was involved with a shipment of $200,000

[9]Petitioner apparently does not seriously contend that he should have been fully named in the July 27 application and order (Pet. No. 75-1393, pp. 7, 17). He does not assert that he was identified before July 26, 1972, and it would scarcely have been practicable to identify him in the July 27 application on the basis of information developed on July 26. See *United States* v. *Curreri*, 368 F. Supp. 757 (D. Md.), affirmed *sub nom. United States* v. *Bernstein*, 509 F. 2d 996 (C.A. 4), petition for writ of certiorari pending, No. 74-1486.

[10]This contention is inconsistent with his claim, discussed above, that the evidence discovered during the course of the July 5 interception required the immediate amendment of that order to name him as a target of the interception.

of bonds stolen from a brokerage house.[11] A commonsense reading of this affidavit (see *United States* v. *Ventresca*, 380 U.S. 102, 108) thus discloses sufficient facts to enable the issuing court to find probable cause to name Labriola as an interception target.[12]

But even assuming *arguendo* that there was insufficient probable cause to name petitioner Labriola in the July 27 order, that fact would not render improper

[11]The texts of these conversations are set out in Pet. No. 75-1394, at pp. 20-23. Although the conversations were somewhat cryptic, it is well recognized that conspirators frequently resort to the use of code words and cover-up jargon to make investigation difficult. *United States* v. *Manfredi*, 488 F. 2d 588, 599 (C.A. 2), certiorari denied, 417 U.S. 936. Thus it was perfectly proper for a detective familiar with the vernacular of the securities trade to interpret the intercepted conversations. See *United States* v. *Cirillo*, 499 F. 2d 872, 881 (C.A. 2), certiorari denied, 419 U.S. 1056; *United States* v. *Borrome-Iglar*, 468 F. 2d 419 (C.A. 2), certiorari denied *sub nom. Gernie* v. *United States*, 410 U.S. 927.

[12]Labriola's related contention (Pet. No. 75-1394, pp. 12-13) that the intercepted conversations were not within the scope authorized by the July 5 order is not well taken. That order described the criminal activity being investigated as "the procurement and distribution of stolen securities" and specified that the communications would relate to the offenses of grand larceny, possession of stolen property, and conspiracy. Clearly, the conversations intercepted under the July 5 order related to just such criminal conduct; see Pet. App. B 2398. *People* v. *DiStefano*, 45 App. Div. 2d 56, 356 N.Y.S. 2d 316, upon which petitioner Labriola relies (Pet. No. 75-1394, pp. 13-18), involved a crime not within the scope of the warrant and is accordingly inapposite. Petitioner Labriola apparently contends that the warrant could not properly authorize the interception of any calls except those relating to the theft and disposition of the particular United States postal bonds Martino originally offered to Reinhardt. But the investigation of that offer, including the facts that the bonds had been stolen from a New York brokerage firm and that Martino was part of an ongoing conspiracy, justified the assumption that more securities were involved, and the warrant thus properly authorized a comprehensive investigation.

the interception of his conversations relating to the crime under investigation. The judge's decision to issue an intercept order is based on his findings that there is probable cause to believe that (1) "an individual is commiting, has committed, or is about to commit" the offense under investigation; (2) "particular communications concerning that offense" will be intercepted; (3) "normal investigative procedures" are inadequate; and (4) "the facilities from which, or the place where, the wire or oral communications are to be intercepted" are being used in the commission of the offense. 18 U.S.C. 2518(3). Petitioner Labriola does not claim that the affidavit supporting the July 27 application contained insufficient facts to support these findings, including the finding that "an individual"—Joe Martino— was committing the offense.[13] Therefore, there was clearly probable cause to issue the intercept order, and the only possible question is whether petitioner Labriola was properly included in the application and order as a person "known [to be] committing the offense" (18 U.S.C. 2518(1)(b)(iv)) or whether he should have been treated as one of the unnamed co-conspirators whose conversations relating to the offense the order also properly permitted to be intercepted. In either event, his conversations were properly intercepted. See Brief for the United States in *United States* v. *Donovan*, No. 75-212, pp. 32-35.

3. The July 27 extension of the intercept order authorized the direct electronic interception of face-to-face conversations occurring at the 1234 Club as well as the continuation of the previous telephone intercepts, but no

[13]Such a claim would be meritless, since the affidavit incorporated the affidavit submitted in support of the July 5 application by reference, and thus included the information obtained from the informant (Orders of July 5 and 27, 1972).

direct interceptions were to be made later than 7:30 p.m. on any day (Order, July 27, 1972). Between August 9 and August 31, the state officers intercepted conversations at the Club without regard for this time restriction (Tr. 332-333, 334-336). Accordingly, the district court suppressed all conversations that were intercepted in violation of the 7:30 p.m. limitation (Tr. 370). Moreover, none of these improperly intercepted conversations was used in applications for subsequent orders.[14]

Petitioners Labriola and Slomka contend, however, that all communications intercepted pursuant to the July 27 order, as well as those seized pursuant to any subsequent order, should have been suppressed. We disagree. In suppressing only those communications that were intercepted in violation of the July 27 order, the court properly applied the general law governing search and seizure. *E.g., United States* v. *Dzialak*, 441 F. 2d 212, 216-217 (C.A. 2), certiorari denied, 404 U.S. 883. Moreover, 18 U.S.C. 2517(3) specifically provides that "any information" that is intercepted "by means authorized" by Title III is admissible as evidence. See also N.Y. Crim. Proc. L. 700.65(3). Accordingly, several courts have held, as did the court below, that only those communications which were improperly intercepted are subject to suppression. See *United States* v. *Cox*, 462 F. 2d 1293, 1301-1302 (C.A. 8),

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[14]In their argument on this point, petitioners Labriola and Slomka allude to two incriminating conversations that were monitored on August 11 and 15 by direct interception (Pet. No. 75-1394, p. 26). The August 15 conversation was not used to support an application for continued surveillance, nor was it introduced as evidence at trial. As stipulated by defense counsel at trial, the August 11 conversation, which was used to support the application for the September 11 order (September 11 Affidavit, p. 10), took place at 3:50 p.m. (Tr. 339-340, 348). It was therefore properly intercepted under the July 27 order.

certiorari denied, 417 U.S. 918; *United States* v. *Sisca*, 361 F. Supp. 735, 746-748 (S.D. N.Y.), affirmed on other grounds, 503 F. 2d 1337, 1346-1349 (C.A. 2), certiorari denied, 419 U.S. 1008; *United States* v. *LaGorga*, 336 F. Supp. 190, 197 (W.D. Pa.); *United States* v. *King*, 335 F. Supp. 523, 544-545 (S.D. Cal.), reversed on other grounds, 478 F. 2d 494 (C.A. 9), certiorari denied, 417 U.S. 920.

While there may be problems formulating an adequate remedy other than complete suppression when there has been a violation of a *general* minimization provision designed to guard against needless interception of innocent conversations (since the suppression of innocent conversations will not provide an effective deterrent against the improper practice), no such difficulties exist when the minimization provision violated is of the kind involved here, prohibiting overhearings at particular times. In such a case, suppression of all improperly intercepted conversations is an adequate and effective remedy, and thus the cases relied upon by petitioners (Pet. No. 1394, p. 28) are inapposite, as the court of appeals correctly recognized (see Pet. App. B 2401-2402).

4. All petitioners claim that their intercepted conversations should have been suppressed because they were not properly served with notice of the interception (Pet. No. 75-1394, pp. 31-34; Pet. No. 75-1393, pp. 10-16). Both the federal and the New York statutes require that persons named in the order, and such other persons as the court directs, shall be notified of the interception within 90 days of "the termination of the period of an order or extensions thereof." 18 U.S.C. 2518(8)(d); N.Y. Crim. Proc. L. 700.50(3). Petitioners Labriola and Principie were named in the extension orders; petitioner Slomka was not named in any order. The final extension terminated

on November 26, 1972, and petitioner Labriola received an appropriate written notice on December 13, 1972 (Tr. 328). Petitioners Principie and Slomka received no formal notification, but they were informed of the interception more than a year before the suppression hearing (Pet. No. 75-1393, App. B).

a. Contrary to petitioner Labriola's assertion, he received timely notice. The final extension of the origina July 5 order terminated on November 26, 1972, and notic was served only 17 days later. Petitioner Labriola reasons however, that the notice period should have commenced running on September 1, when the last interception was made at the 1234 Club. This interpretation was properly rejected by the court of appeals (Pet. App. B 2405-2406).

> We believe that the 90-day period should be calculated from November 26. The language of the statute indicates that notice is due 90 days after the "termination of the period of an order or extensions thereof," not 90 days after the police stop monitoring conversations. In this case, the authorization to intercept conversations at the 1234 Club was renewed on September 11, and again, amended to cover a new location, renewed twice subsequently. The investigation continued, and Labriola continued to be named in the orders as a subject of court-authorized wiretapping. To interpret the statute to require [notice] 90 days after September 1, in these circumstances, would frustrate the evident intention of the statute to defer notice to the end of the investigation, without any justification in policy or the language of the statute. [Footnote omitted.]

b. Neither Principie nor Slomka received the written notice envisioned by Section 2518(8)(d). But they do not show that they were in any way prejudiced by the failure

to receive formal notification, and the court of appeals correctly refused to suppress their conversations (Pet. App. B 2404, 2406). We argue in our brief in *United States* v. *Donovan*, *supra*, at pp. 39-45, that there is no statutory requirement obligating the government to identify all persons whose incriminating conversations are overheard, when no such comprehensive list is requested by the issuing judge. Accordingly, even if petitioner Slomka's name was not provided to the issuing judge, there was no requirement to serve an inventory notice on her, since she was not named in any of the orders, and the issuing judge did not direct the service of discretionary notice on her. In any event, as we further argue in our *Donovan* brief (at pp. 46-56), an inadvertent error in implementing the statutory inventory procedures is not a defect warranting suppression in the absence of a showing of prejudice. The claims of both petitioner Slomka and petitioner Principie may thus be controlled by this Court's decision in *Donovan*.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 75-1394 should be denied with respect to petitioner Labriola, and that action on that petition with respect to petitioner Slomka and on the petition in No. 75-1393 should be deferred pending this Court's disposition of *United States* v. *Donovan*.

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